

National
Coalition on

BENEFITS

May 15, 2015

Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Section 49801 – Excise Tax on High Cost Employer-Sponsored Health Coverage, Notice 2015-16

Dear Secretary Lew and Commissioner Koskinen:

In response to the Notice issued on February 23, 2015, the National Coalition on Benefits (“NCB”) appreciates the opportunity to comment on the IRS Notice regarding Section 4980I of the Internal Revenue Code which was added by the Patient Protection and Affordable Care Act (“ACA”), (Pub. L. 111-148), regarding the excise tax on high cost employer-sponsored health coverage. In our comments, we particularly want to urge Treasury and the IRS to allow flexibility when drafting implementation rules for the excise tax.

The National Coalition on Benefits (NCB) is a coalition of national businesses and employer associations established to support the employer-sponsored health care system and ensure that companies can continue to provide health benefits in a uniform manner nationwide (www.coalitiononbenefits.org). NCB works with Congress and the Administration to ensure that federal and state health reform initiatives preserve, rather than erode, protections guaranteed by the Employee Retirement Income Security Act (ERISA).

As an organization representing American companies that voluntarily provide health coverage to their employees, we are committed to improving our employees’ health and hope to work with IRS to address aspects of implementing the excise tax that could impede this commitment. We believe the language of Section 4980I, as drafted, affords regulators flexibility, and as such, the idea of flexibility is a central focus of our comments. Specifically we urge Treasury and the IRS to allow flexibility in determining “applicable coverage,” the cost of applicable coverage, and allowable adjustments to dollar limit thresholds.

Our organization represents employers who highly value activities that improve the quality and affordability of health services, reduce medical errors and waste, and increase the health status of employees and their families. More than 150 million Americans obtain coverage through employer-sponsored health plans and, increasingly, a core component of the services that these plans are expected to deliver relates to quality improvement, patient safety and wellness.

As a matter of even higher urgency, however, we strongly recommend that implementation of, and reporting for, the 4980I excise tax be delayed for at least two years following release of the final rule. Employers now are extremely concerned that a 2018 effective date does not allow sufficient time for the government to promulgate workable rules to implement the tax, along with an appropriate payment and collection system, or for companies to then be able to plan for and develop the necessary design changes and communicate the major impacts to employees and their families.

Determining Applicable Coverage

Section 4980I(a)(2) states that if “there is any excess benefit with respect to the coverage, there is hereby imposed a tax equal to 40 percent of the excess benefit.” The cost of the plan applicable to the excise tax should be any “excess value,” rather than an amount compared with a base level of the plan.

The “plan” should include major medical and prescription benefits, but should exclude programs designed to improve health and wellness (e.g., wellness programs and onsite medical clinics), employee contributions to a health savings account (“HSA”), flexible spending account (“FSA”), health reimbursement arrangement (“HRA”), any benefit that can be treated as an “excepted benefit,” and any mandated benefits coverage.

Any benefit that is treated as an “excepted benefit,” including self-insured vision and dental coverage and employee assistance programs (“EAP”), should be excluded from the calculation. NCB urges Treasury and the IRS to exclude all benefits that are considered excepted benefits, regardless of the type, from calculations for purposes of the excise tax. Similarly, NCB believes that any benefit for which coverage is required, such as \$0 cost-sharing for certain mandated preventive benefits, should not be considered an excess benefit, and should not be included as applicable coverage for purposes of calculating the tax. A benefit cannot be both required and excess. Therefore, any benefits included in the minimum benefits package should not be included in the calculation of applicable coverage for purposes of this tax.

As a group that is committed to improving the quality of care for our employees, the NCB asks that any costs associated with improving health, as opposed to direct medical costs, be excluded from the calculation of applicable coverage for purposes of this tax. Programs intended to improve health, such as wellness programs and on-site clinics, are designed to lower overall costs, as well as improve the health of participants. Similarly, although we strongly urge that *all* contributions to an HSA be excluded from the excise tax calculation, we would ask at a minimum that employees’ pre-tax contributions to health savings accounts (“HSA”) be excluded from the calculation. NCB members encourage employees to contribute to their HSA accounts as a way of engaging employees in their health and health care. Inclusion of these monies into the calculation of applicable coverage will only penalize employees and their families.

In the same vein, any program designed to drive delivery system innovation to improve value should be excluded from the calculation. Such programs include, but are not limited to, accountable care organizations (“ACOs”), patient-centered medical homes (“PCMHs”), Centers of Excellence, bundled payment initiatives, and others. These programs are designed to encourage efficiency and affordability, and improve the quality and overall patient experience with care. Additionally, programs such as these can be used as tools to slow rising health care costs. If innovation is to continue, the health care system must recognize and encourage innovation. We urge Treasury and the IRS to exclude the costs of programs aimed at innovation in health care delivery from the calculation of applicable coverage.

The Cost of Applicable Coverage

The NCB interprets the statutory language related to calculating the cost of applicable coverage, particularly as it relates to “blending” tiers between self- and other-than-self coverage, as allowing for flexibility. As such, NCB urges Treasury and the IRS, in any future implementing regulations, to grant employers as much flexibility as possible in this area. Section 4980I imposes a 40 percent excise tax on the excess, if any, of the aggregate cost of the applicable coverage of an employee for a month over the applicable dollar limit for the month. Section 4980I(d)(2)(A) provides that the cost of applicable coverage generally is determined under rules similar to the rules of § 4980B(f)(4), which apply for purposes of determining the COBRA applicable premium.

Section 4980I thus does not mandate the use of the rules in § 4980B(f)(4) to calculate the aggregate cost of applicable coverage of an employee, which gives Treasury and the IRS considerable flexibility to construct the rules to be used to determine the cost of applicable employer-sponsored coverage. This distinction is crucial as

calculations of premium costs for COBRA and for the excise tax serve two completely different purposes. There is nothing preventing the Departments from interpreting “similarly situated beneficiary” as broadly as possible in subsequent regulations. For these reasons, we urge Treasury and the IRS to adopt a flexible approach.

No two employer plans are alike in design, offerings and administration. For example, the make-up of each company’s covered population varies in geographical costs, age of employees, etc. All these differences can result in very different costs for employees who would otherwise be “similarly situated.” Each company should have flexibility to determine the cost of applicable coverage in a way that will fit the needs of the company and its health benefit offerings. Due to differences in the number of plan or plan options that employers offer their employees, companies need flexibility to aggregate or disaggregate any plans or plan options. Any rules with respect to this calculation should take into account that while plans may vary in cost, they do not necessarily vary in their underlying value. NCB asks that each company retain the ability to aggregate or disaggregate as appropriate.

The NCB asks for greater flexibility in the mechanism used to determine the cost of applicable coverage, much like Medicare Part D allows multiple options for determining the cost of coverage, including prospective or retrospective assessment, or actuarial attestation. For instance, we urge that a mechanism be developed to equate the statutory dollar threshold (as indexed for a particular year and applied across the nation) to an equivalent actuarial value, and that plans with an actuarial value not exceeding this equivalence be exempt from the excise tax. We request that, in the alternative, a plan below 80% AV is deemed to be exempt from the excise tax in order to maintain stability and certainty in the value of the benefit.

The IRS should allow employers options in determining the most accurate “value” for the employee’s coverage. We encourage Treasury and the IRS to give employers latitude in choosing a mechanism for determining the cost of applicable coverage. Additionally, we ask for flexibility to elect the lowest cost plan for calculation. Employers are not able to immediately discontinue higher cost plans as it would be disruptive and harmful to employees with poorer health.

We would also ask for a “safe harbor” for any plan that is at or below the minimum value requirement regarding the cost of the plan. Potentially, an employer could be subject to the excise tax for “excess benefit,” but if the employer reduced benefits and fell below the required “minimum value,” the employer could be subject to an alternate penalty if an employee did not elect coverage and received a subsidy through the Marketplace. If any employer offers a plan that just meets the minimum value requirement, that employer should not be subject to the excise tax if the value of benefits exceeds the threshold.

Lastly, we have concerns about the indexing of the threshold being tied to CPI-U, which does not take into account expected increases in medical costs. NCB asks that Treasury and the IRS instead tie indexing to the medical inflation rate.

Adjustments to Thresholds

The excise tax was designed to apply to “excess benefits;” however, a survey by Mercer anticipates that one-third of employers will be subject to the tax in 2018, growing to 60 percent by 2022. The tax is linked to the consumer price index (“CPI”) plus one percent in 2019 and only to CPI in 2020 and beyond; medical and insurance costs are growing far faster. As a result, more and more plans will be hit with the 40 percent tax each year. The goal of the ACA was to expand coverage by both making coverage available to more individuals, and ensuring that all individuals have adequate coverage. If the excise tax is implemented as it stands, eventually all employers will be affected. Employers have already begun to scale back employee benefits offerings in response to the ACA; as more restraints are put on employers’ ability to offer quality coverage to their employees, many companies may decide to forego offering employer-sponsored health coverage altogether.

Payment of the Tax

While this Notice did not address payment of the tax, NCB would like to raise its concern about the fair administration of the tax. We believe that employers who sponsor the health plans subject to the tax should have the flexibility to remit the tax payments directly to the IRS or to use their third party administrators to remit the tax if so they choose. Requiring employers to use a third party to administer the tax causes unnecessary complication, not to mention a cost burden. It would be less costly and administratively simpler to allow the employer to administer the tax.

The NCB believes that employers' ability to voluntarily offer and maintain benefit plans is an integral part of our health care system. Employers must continue to have flexibility to determine how to best meet the needs of their employees and retirees, and reforms to the current system must continue to support ERISA's goals of promoting consistency, simplicity and predictability.

Thank you for considering our comments on these important issues.

Sincerely,

National Coalition on Benefits